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In The Supreme Court of the United States

ANTONIO DWAYNE HALBERT,

Petitioner,

v.

MICHIGAN,

Respondent.

On Writ Of Certiorari To The Michigan Court Of Appeals

REPLY BRIEF FOR THE PETITIONER

DAVID A. MORAN
(*Counsel of Record*)
WAYNE STATE UNIVERSITY LAW SCHOOL
471 West Palmer Street
Detroit, Michigan 48202
(313) 577-4829

MARK GRANZOTTO
414 West Fifth Street
Royal Oak, Michigan 48067
(248) 546-4649

MICHAEL J. STEINBERG
KARY L. MOSS
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MICHIGAN
60 West Hancock Street
Detroit, Michigan 48201
(313) 578-6814

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2611

TERENCE R. FLANAGAN
P.O. Box 413
Hartland, Michigan 48353
(810) 632-9633

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I. Petitioner's Application for Leave To Appeal Was a First-Tier Appeal on the Merits	2
A. Respondent's Claim That a Post-Sentencing Motion by Trial Counsel Is a First-Tier Appeal Is Both Contrary to *Swenson v. Bosler* and Wrong as a Matter of Fact	2
B. Petitioner's Application for Leave To Appeal Was Not a "Discretionary" Appeal	9
II. Petitioner Cannot Be Forced, as a Condition of Entering a Plea, To Waive His Right to Appellate Counsel Solely Because of His Indigency, Nor Did He Do So	14
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES:

Anders v. California, 386 U.S. 738 (1967) 6

Cabaniss v. Cunningham, 143 S.E.2d 911 (Va. 1965) 13

Coleman v. Thompson, 501 U.S. 722 (1991) 13

Douglas v. California, 372 U.S. 353 (1963) ..... *passim*

Ellis v. United States, 356 U.S. 674 (1958) 13

Evitts v. Lucey, 469 U.S. 387 (1985) 3, 8, 9, 10

Griffin v. Illinois, 351 U.S. 12 (1956) 10

Iowa v. Tovar, 541 U.S. 77 (2004) 14, 15

Peguero v. United States, 526 U.S. 23 (1999) 14

People v. Bulger, 614 N.W.2d 103 (Mich. 2000) ... 9, 10, 11, 13

People v. Douglas, 332 N.W.2d 521 (Mich. Ct. App. 1983) 11

People v. Hayden, 348 N.W.2d 672 (Mich. Ct. App. 1984) 11

People v. Kimble, 684 N.W.2d 669 (Mich. 2004) 4

People v. Plaza, 617 N.W.2d 687 (Mich. 2000) 8

People v. Walker, 653 N.W.2d 621 (Mich. 2002) 10, 11

People v. Wiley, 315 N.W.2d 540 (Mich. Ct. App. 1981) 11

Roe v. Flores-Ortega, 528 U.S. 470 (2000) 14

Ross v. Moffitt, 417 U.S. 600 (1974) 1, 2

Smith v. Robbins, 528 U.S. 259 (2000) 6, 13

Swenson v. Bosler, 386 U.S. 258 (1967) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

COURT RULES

Mich. Ct. R. 6.005(H)(4) 3

Mich. Ct. R. 6.311(A) 5

Mich. Ct. R. 6.429(B)(3) 5

OTHER AUTHORITIES:

Mich. Sentencing Guidelines Manual (2005), *available at* http://courts.michigan.gov/mji/resources/sentencing-guidelines/sg.htm 7

National Center for State Courts, *Understanding Reversible Error in Criminal Appeals* 18-19 (1989) 8

Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127 (1995) 8

REPLY BRIEF

Most of Respondent's argument consists of an attempt to recharacterize the appeal at issue in this case. According to Respondent, Petitioner's application for leave to appeal to the Michigan Court of Appeals following his plea-based conviction was, despite all appearances to the contrary, a *second-tier* appeal because there is a Michigan court rule that allows for the preservation of issues in the trial court before an appeal is filed. Further, Respondent claims, Petitioner's appeal was *discretionary*, even though the Court of Appeals rejected it on the merits with preclusive effect, simply because the Michigan Supreme Court once referred to such appeals as discretionary. Thus, Respondent claims that Petitioner's appeal was just like the second-tier, discretionary appeal at issue in *Ross v. Moffitt*, 417 U.S. 600 (1974), for which counsel was not required.

Respondent's argument fails at every turn. Petitioner's application for leave to appeal was manifestly a *first-tier* appeal (as even Respondent's *amici* admit). The court rule on which Respondent relies does not provide an "appeal"; it is nothing more than a post-sentencing issue preservation procedure. That procedure was not used in Petitioner's case and is, in fact, almost never used because trial attorneys usually either preserve appellate issues at the time they arise or do not preserve them at all. More importantly, this Court has directly rejected precisely such an attempt to characterize the availability of a post-sentencing issue preservation procedure as the equivalent of a first-tier appeal. *Swenson v. Bosler*, 386 U.S. 258 (1967).

Petitioner's application was also not *discretionary* as it was decided on the merits. The fact that the Michigan Supreme Court once labeled such applications "discretionary" does not make it so, particularly given that the same court also recognized that such applications are decided on the merits. Even if such applications truly were discretionary, Michigan would still have to provide appellate counsel in order to meet the meaningful access standard of *Ross*.

Respondent also argues that since some courts have held that a defendant may negotiate away his or her right to appeal as a condition of a plea, Michigan may require all indigent plea defendants to waive their right to appellate counsel. But Respondent misses the point that appellate waivers affect the rich and poor alike while Michigan's system denies meaningful appeals only to the indigent. The proper analogy would be a jurisdiction that required indigents, and only indigents, to waive their right to appeal in order to receive the benefits of a plea. The effect of Michigan's system is exactly that. A forced waiver applicable only to the poor cannot salvage Michigan's unconstitutional scheme.

I. Petitioner's Application for Leave To Appeal Was a First-Tier Appeal on the Merits.

A. Respondent's Claim That a Post-Sentencing Motion by Trial Counsel Is a First-Tier Appeal Is Both Contrary to *Swenson v. Bosler* and Wrong as a Matter of Fact.

Respondent admits that *Douglas v. California*, 372 U.S. 353 (1963), requires the appointment of appellate counsel "where a State grants a defendant a first appeal as

of right on the merits." Resp. Br. 21. The centerpiece of Respondent's argument, however, is the claim that a Michigan indigent who is convicted by plea receives first-tier appellate review in the trial court because Michigan Court Rule 6.005(H)(4) requires appointed trial counsel to file "postconviction motions the lawyer deems appropriate." Resp. Br. 17-21. Since it is a lawyer who files these motions, Respondent reasons, this procedure is all that is required to satisfy *Douglas*. Resp. Br. 21-31.

The most obvious objection to this argument is that this Court squarely rejected it in *Swenson v. Bosler*, 386 U.S. 258 (1967) (*per curiam*). In *Swenson*, this Court considered a pre-*Douglas* Missouri scheme in which "[i]f trial counsel filed a motion for new trial and notice of appeal and then withdrew from the case, the Supreme Court of Missouri would require preparation of the transcript for appeal and then would consider the questions raised by the motion for new trial on the basis of pro se briefs by the defendant-appellant, or on no briefs at all." *Id.* at 259.

This Court unanimously concluded that this scheme violated *Douglas* "even though respondent's trial counsel filed the notice of appeal and a motion for new trial which specifically designated the issues which could be considered on direct appeal." *Id.* The Court specifically found this scheme unconstitutional because it denied the indigent "the assistance of *appellate counsel* in preparing and submitting a *brief* to the appellate court which defines the legal principles upon which the claims of error are based and which designates and interprets the relevant portions of the trial transcript[.]" *Id.* (emphasis added); *accord Evitts v. Lucey* 469 U.S. 387, 394 (1985) (citing *Bosler* for importance of appellate brief prepared by counsel).

In many respects, the Missouri scheme this Court struck down in *Bosler* was far better than the Michigan scheme at issue here. Unlike the Missouri system, which required that *all* appellate issues first be raised in a motion for new trial, *id.* at 258, the vast majority of appellate issues following plea-based convictions in Michigan will not, or need not, be raised in a post-sentencing motion. In fact, written post-sentencing motions by trial counsel in plea cases are exceedingly rare in Michigan because they are filed if and only if two conditions occur: (1) trial counsel failed to preserve the issue at the time it arose; and (2) after sentencing, the same trial counsel who failed to raise the issue realizes his or her mistake and decides to correct it by filing a post-sentencing motion.

Petitioner's case illustrates the point. Petitioner's trial counsel preserved one appellate issue at the time it arose by orally requesting concurrent sentences before the sentences were imposed. J.A. 33. Therefore, there was no need to file a post-sentencing motion to preserve that issue, and none was filed. Indeed, the Michigan Supreme Court has held that some sentencing issues may be raised on appeal even if they are never preserved in the trial court. *See People v. Kimble*, 684 N.W.2d 669, 672-74 (Mich. 2004) (holding that some unpreserved sentencing guidelines errors are appealable as "plain error").

But Petitioner's trial counsel completely missed at least four other potential appellate issues: (1) the absence of a factual basis for one of the two counts; (2) the misscoring of Offense Variable ("OV") 9 in the first case; (3) the misscoring of OV 13 in both cases; and (4) the unconstitutionality of the Michigan sentencing guidelines. *See* Pet. Br. 35-37. Not surprisingly, trial counsel, having missed all of these issues when they arose, did not suddenly realize

his mistakes and file a post-sentencing motion after Petitioner had been shipped off to prison.

If Petitioner's requests for appellate counsel had been granted, however, that appellate counsel would have read the record and filed a post-sentencing motion in the trial court to preserve the issues that trial counsel had missed. *See* Mich. Ct. R. 6.311(A) (permitting filing of motion to withdraw plea during time for filing application for leave to appeal); Mich. Ct. R. 6.429(B)(3) (permitting filing of motion for resentencing during time for filing application for leave to appeal).

Alternatively, if the missed issues could not be preserved by a post-sentencing motion, Petitioner's appellate counsel would have moved to create the evidentiary record necessary to establish that trial counsel was ineffective, a claim that generally must be raised on direct appeal in Michigan. Petitioner's trial counsel obviously could not move for and conduct an evidentiary hearing on his own ineffectiveness.

Since Petitioner could not hire an appellate attorney and the trial judge twice refused to appoint one, Petitioner had no hope of receiving meaningful review of his appellate issues. Petitioner's trial attorney did not file a post-sentencing motion because he apparently was still unaware of the issues he had missed (or, if he was aware of them, could not be expected to litigate his own ineffectiveness). Respondent's argument that the theoretical possibility that trial counsel might file such a motion is enough to satisfy *Douglas* is not only contrary to *Bosler*, it is a sham.

Respondent quibbles over the statistics showing the success of plea appeals in Michigan before the statute went into effect but actually undermines its own argument

by doing so. In response to statistics quoted by Petitioner showing that 12 to 47 percent of plea appeals resulted in relief to defendants, Respondent "counters" with statistics still showing that more than 10 percent of plea appeals resulted in relief *in the Michigan Court of Appeals alone*. *See* Resp. Br. 2-3 & n.4 (citing quote from former Chief Judge of Michigan Court of Appeals). Putting aside Respondent's effort to minimize a one-in-ten appellate success rate, Respondent completely misses the point that appellate counsel often obtain relief for plea defendants *in the trial court*. Thus, the 47 percent statistic from the State Appellate Defender Office included not only those plea appeals that resulted in relief in the Michigan Court of Appeals, but the even larger number of cases in which appellate counsel obtained relief for plea defendants by filing post-sentencing motions in the trial court to raise issues that trial counsel had missed.

Respondent's argument about the statistics is also beside the point. Even if most plea appeals were meritless, this Court's cases teach that a state cannot deny indigents the assistance of appellate counsel simply because most of their appeals will turn out to be fruitless. *See Smith v. Robbins*, 528 U.S. 259, 277 (2000) (noting that goal of *Anders v. California*, 386 U.S. 738 (1967) was "to ensure that those indigents whose appeals are not frivolous receive the counsel and merits brief required by *Douglas*"); *see also Smith*, 528 U.S. at 279 n.10 ("Although an indigent whose appeal is frivolous has no right to have an advocate make his case to the appellate court, such an indigent does, in all cases, have the right to have an attorney, zealous for the indigent's interests, evaluate his case and attempt to discern non-frivolous arguments").

In any event, both Petitioner's and Respondent's statistics predate the Michigan Legislature's 1999 adoption of mandatory sentencing guidelines. As Petitioner's experience illustrates, these extraordinarily complex guidelines have greatly increased the number of potentially meritorious sentencing issues in plea cases.

Indeed, Respondent concedes that Petitioner erroneously received 10 points for OV 9 in the first case, Resp. Br. 36, and Respondent never denies that Petitioner also erroneously received 25 points for OV 13 in both cases. *See* Pet. Br. 35. Respondent also points out, correctly, that Prior Record Variable ("PRV") 7 was erroneously scored in Petitioner's favor in the first case. Resp. Br. 37. Thus, at least *four* different sentencing guidelines were scored incorrectly, three in Respondent's favor and one in Petitioner's favor. Had all four of those guidelines been scored correctly, Petitioner's guideline range on the first case would have been 10 to 19 months (he received 24 months), and his guideline range on the second case would have been 12 to 24 months (he received 57 months).

If trial counsel had objected to the misscored guidelines at sentencing, Petitioner would have had to rely entirely on that oral objection to write his application for leave to appeal. Since trial counsel did not object and, unsurprisingly, did not later recognize his mistake, Petitioner did not even have that. To even discover the misscored guidelines, Petitioner would have had to wade through and understand a complicated sentencing guidelines manual that runs to over 170 pages, assuming he somehow could have obtained a copy of that manual. *See* Mich. Sentencing Guidelines Manual (2005), *available at* http://courts.michigan.gov/mji/resources/sentencing-guidelines/sg.htm.

Finally, the large number of sentencing errors committed in Petitioner's case is hardly unique to him or to Michigan. A National Center for State Courts study of five states found that when sentencing issues were raised on appeal, the appellate courts found error 25 percent of the time. National Center for State Courts, *Understanding Reversible Error in Criminal Appeals* 18-19 (1989); *see also* Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127, 190-91 (1995) (discussing study finding 24 percent of plea appeals in two appellate courts resulted in defendants receiving relief).

The pre-*Douglas* scheme this Court struck down in *Bosler* was superior to the Michigan scheme not only because it actually required trial counsel to file a post-conviction motion listing all of the appellate issues, an event that rarely occurs in Michigan, but also because trial counsel was required to file the notice of appeal and the appellate court ordered the transcript for the indigent. 386 U.S. at 259. In Michigan, by contrast, the incarcerated indigent is required to initiate her own appeal and order her own transcripts, even though she may be illiterate, mentally ill, and/or unfamiliar with the English language. This Court has recognized that many or most indigents will be unable to overcome these "hopelessly forbidding" procedural obstacles. *See Evitts*, 469 U.S. at 396; *see also People v. Plaza*, 617 N.W.2d 687 (Mich. 2000) (rejecting sentencing appeal by *pro se* indigent because he was unable to obtain his sentencing transcript).

In sum, a post-sentencing motion by trial counsel is not an appeal, first-tier or otherwise. As *Bosler* makes clear, such a motion is certainly not a substitute for a brief by appellate counsel. Nor does such a motion satisfy the other requisites for meaningful access to the appellate

courts, such as transcripts and a written opinion of a first-tier appellate court. *See Evitts,* 469 U.S. at 402 (concluding that *Douglas* governed first-tier appeal where indigent had not previously had benefit of transcript, brief on merits, or written opinion). As Petitioner's case illustrates, a post-sentencing motion by trial counsel is not even a theoretical substitute for first-tier appellate review in Michigan since such motions are not required and are rarely filed.

B. Petitioner's Application for Leave To Appeal Was Not a "Discretionary" Appeal.

In direct contrast to Respondent, Respondent's *amici* forthrightly admit that "[t]he proceeding at issue here certainly is a 'first appeal,'" Brief of *Amici Curiae* Louisiana, et al. ("Louisiana") 12. Like Respondent, however, Louisiana claims that the proceeding is a "discretionary" appeal. *Id.* at 7 n.1. Though Respondent and Louisiana arrive at that conclusion in radically different ways, both are mistaken.

Petitioner's application was denied "for lack of merit in the grounds presented." J.A. 72. Even though the Michigan Court of Appeals has held many, many times that its denials of applications are preclusive decisions on the merits, *see* Pet. Br. 27-28, Respondent insists on characterizing such applications as "discretionary appeals" simply because the Michigan Supreme Court majority labeled it as such in *People v. Bulger*, 614 N.W.2d 103, 104-05 (Mich. 2000). Resp. Br. 32-33.

The first and most fundamental problem with Respondent's argument is that the majority in *Bulger* certainly never held that an application to the Michigan

Court of Appeals is not decided on the merits. Since the majority in *Bulger* never explained why the application was "discretionary," the use of that term was nothing but a labeling exercise. *Evitts* teaches that this Court must look to the function of the appeal, not the label the state applies, to decide whether it falls within the rule of *Douglas*. *See Evitts*, 469 U.S. at 402 (rejecting state effort to label appeal as "conditional" and concluding first-tier error-correcting appeal was governed by *Douglas*).

By contrast to the majority, the dissent in *Bulger* did examine the function of the application for leave to appeal to the Michigan Court of Appeals and concluded, "the function of the Court of Appeals is correcting errors. Thus, the function of that Court is precisely addressed by *Griffin* [*v. Illinois*, 351 U.S. 12 (1956),] and *Douglas*, and conversely not at all by *Ross*." *Bulger*, 614 N.W.2d at 124 (Cavanagh, J., dissenting). Remarkably, Respondent includes a long quote from that *Bulger* dissent that supposedly shows that a Michigan Court of Appeals application is not designed to correct errors, Resp. Br. 33, but omits the very next sentence where Justice Cavanagh explained, "In the North Carolina situation considered in *Ross*, the correctness of the decision below was unmentioned and arguably irrelevant under the governing statute, but the function of our Court of Appeals is reviewing the merits and correcting errors made by the lower courts." *Id.* at 125.

If there were any doubt as to the Michigan Supreme Court's understanding of the function of an application to the Michigan Court of Appeals, that doubt was dispelled in *People v. Walker*, 653 N.W.2d 621 (Mich. 2002). In *Walker*, the Michigan Supreme Court rejected an appeal from a defendant who claimed that he had received ineffective

assistance of appellate counsel because his retained attorney had filed his notice of appeal late and therefore was forced to proceed to the Michigan Court of Appeals by an application for leave to appeal. In rejecting Walker's claim that he had been prejudiced by having to proceed via application, *the author of the Bulger opinion* observed that the Michigan Court of Appeals had denied Walker's application "for lack of merit in the grounds presented" and that this denial proved that the "Court of Appeals reviewed the substantive arguments advanced in the application and concluded that they lacked merit." *Walker*, 653 N.W.2d at 622 (Corrigan, C.J., concurring); *see also id.* at 623 n.5 ("the Court of Appeals plainly considered the merits of defendant's arguments").

Respondent also tries to dismiss the mountain of Michigan Court of Appeals authority holding that its own denials of applications constitute binding decisions on the merits by noting that the three published decisions from the 1980s involved remands and that the decisions ever since have been unpublished. Yet nothing in those three published decisions (*People v. Hayden*, 348 N.W.2d 672, 684 (Mich. Ct. App. 1984); *People v. Douglas*, 332 N.W.2d 521, 523 (Mich. Ct. App. 1983); and *People v. Wiley*, 315 N.W.2d 540, 541 (Mich. Ct. App. 1981)) turned on the fact that the previous orders involved remands. The numerous decisions since the 1980s show that the Michigan Court of Appeals routinely applies *Hayden*, *Douglas*, and *Wiley* to hold that orders denying applications are conclusive decisions on the merits. *See* Pet. Br. at 27-28.

Respondent wants to have it both ways. In this Court, Respondent claims that an order denying an application for lack of merit is not a merits determination. But Respondent gladly regards such orders as merits determinations in

state court because doing so bars defendants from relitigating their claims, and Respondent gladly regards such orders as merits determinations in the lower federal courts because doing so triggers deference on habeas corpus review. *See* Pet. Br. 28-29.

The order of the Michigan Court of Appeals denying Petitioner's application "for lack of merit in the grounds presented" means what it says. An application for leave to appeal from a plea-based conviction is not "discretionary" because it is a first appeal decided on the merits, just like the first-tier appeals in several other states. *See* Pet. Br. 24-27, 30 (describing first-tier appeals by petition or application in six states). Therefore, Michigan is required to provide counsel, just as all of those other states do.

Unlike Respondent, Louisiana reaches the conclusion that the appeal at issue is "discretionary" without any reference to the function of that appeal or the way it is actually decided. Instead, Louisiana reasons that "Michigan law does not regulate when leave to appeal should or must be granted and, therefore, this decision by the Michigan Court of Appeals is, by definition, 'discretionary.'" Louisiana Br. 7 n.1.

Louisiana's argument thus confuses the question of whether Michigan has discretion to set up its appellate system in a different way than it has (which it surely does) with the entirely separate question of what function that appellate system actually performed in Petitioner's case. Only the latter question is relevant to this appeal. The Michigan Court of Appeals reviewed and rejected Petitioner's application on the merits. Therefore, the appeal was not "discretionary."

Having started with the false premise that the appeal at issue in this case is a first-tier *discretionary* appeal, Louisiana proceeds to argue at length that this Court should not "extend" *Douglas* to cover it. In fact, no extension of *Douglas* is required, nor would any extension be required even if the first appeal in Michigan truly were "discretionary."

As Petitioner has already documented, Pet. Br. at 24-25, the appeal at issue in this case is just one of many examples of first-tier screened or expedited appeals designed to reduce the workloads of first-tier appellate courts. With the exception of Michigan, every jurisdiction with a first-tier appeal by application or petition currently provides counsel, and this Court has explicitly endorsed the conclusion of at least one of those states that *Douglas* requires counsel. *See Coleman v. Thompson*, 501 U.S. 722, 742 (1991) (citing approvingly *Cabaniss v. Cunningham*, 143 S.E.2d 911, 913-14 (Va. 1965)). This Court itself reached the conclusion that appellate counsel is required for a first-tier application for leave to appeal in *Ellis v. United States*, 356 U.S. 674 (1958), and in *Smith*, 528 U.S. at 279 & n.10, this Court directly stated that this holding from *Ellis* is part of the constitutional minimum required by *Douglas*.

Even those few jurisdictions that have or had truly "discretionary" first-tier felony appeals have uniformly provided appellate counsel, and no state or federal court since *Douglas*, with the exception of the *Bulger* court, has ever held that counsel is not required for a first-tier felony appeal by application. The state and federal courts have not drawn any distinction for plea appeals, and such a distinction would run afoul of this Court's precedents recognizing that indigents in plea appeals

such as Petitioner cannot reasonably be expected to identify and brief their own issues. *See Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000); *see also Peguero v. United States*, 526 U.S. 23, 30 (1999) (O'Connor, J., concurring).

In short, Petitioner does not request an "extension" of *Douglas*. He simply wants Michigan to apply *Douglas* to a first-tier felony appeal like every other jurisdiction does and as this Court's precedents dictate.

II. Petitioner Cannot Be Forced, as a Condition of Entering a Plea, To Waive His Right to Appellate Counsel Solely Because of His Indigency, Nor Did He Do So.

Respondent argues that it may constitutionally require indigents, and only indigents, to waive their right to appellate counsel in order to receive the benefits of a plea. Resp. Br. 42-49. In support of this argument, Respondent heavily relies on *Iowa v. Tovar*, 541 U.S. 77 (2004). Resp. Br. 42-46.

Respondent's heavy reliance on *Tovar* is puzzling. The most obvious distinction between *Tovar* and this case is that Mr. Tovar, unlike Petitioner, was *not forced to choose between his right to counsel and the benefits of a guilty plea*. On the contrary, Mr. Tovar chose to plead guilty and be sentenced without counsel despite being repeatedly reminded of his right to counsel. *See id.*, 541 U.S. at 90-91 (noting that Mr. Tovar "waived counsel at his initial appearance, affirmed that he wanted to represent himself at the plea hearing, and declined the court's offer of time to hire an attorney at sentencing") (internal citations and quotation marks omitted).

Tovar would be analogous to the instant case if Mr. Tovar had been indigent and had not been allowed to plead guilty unless he first waived his right to appointed counsel. If Mr. Tovar had been given that ultimatum, his "waiver" of counsel would have been invalid both because the unconstitutional condition would have rendered his decision involuntary and because the forced waiver would have discriminated against the indigent. But that is the choice indigents, and only indigents, face under the Michigan statute.

The other critical distinction between *Tovar* and this case is that there is no doubt that Mr. Tovar understood he was waiving his right to counsel. Petitioner, by contrast, was told that he would receive the assistance of appellate counsel if his case fit within the statutory exceptions, but was never told that he would not receive counsel otherwise. *See* Pet. Br. 46-48.

Respondent also argues that a forced waiver of appellate counsel must be constitutional since the value of the right to counsel Mr. Tovar waived "far surpassed the value of the right that Petitioner waived." Resp. Br. 46. Petitioner certainly does not agree that the right to appellate counsel to help him correct sentencing errors resulting in extra years in prison is any less valuable than the right to counsel at a plea hearing. In any event, Respondent cites no precedent supporting the notion that a forced waiver somehow becomes constitutional if the right waived is deemed less valuable than some other right.

Finally, Respondent argues that Michigan may require a waiver of appellate counsel from the indigent since some lower courts have upheld "appeal waivers" as part of negotiated guilty pleas. Resp. Br. 48-49. Respondent

reasons that if the government may require a defendant to give up his right to appeal altogether in exchange for the benefits of a plea, surely the government may require the defendant to give up only his right to counsel for that appeal.

Once again, Respondent's analogy is inapt and ignores the discriminatory nature of Michigan's scheme. A proper analogy to this case would be if a state were to adopt a statute requiring *only indigents* to agree to appeal waivers as a condition of entering pleas. Thus, whether it is constitutional for a state to require all defendants to waive their right to appeal as a condition of entering pleas (a question the Court has not decided) or whether it is constitutional to extract appeal waivers from some defendants through plea bargaining (another question the Court has not decided) is beside the point. It is plainly unconstitutional to require indigents, and only indigents, to waive their right to appeal in order to enter a plea. As the Court has explained, the Fourteenth Amendment bars states from "grant[ing] appellate review in such a way as to discriminate against some convicted defendants on account of their poverty." *Douglas*, 372 U.S. at 355.

The Michigan statute does exactly that. It requires the poor, and only the poor, to waive any meaningful chance of having sentencing and other errors corrected as a condition of receiving the benefits of a plea, while moneyed defendants receive the benefits of a plea secure in the knowledge that they will obtain meaningful review of any errors that may occur in their plea and sentencing hearings. Therefore, even if Petitioner had waived his right to appellate counsel, which he did not, that forced discriminatory waiver would itself be unconstitutional.

CONCLUSION

The judgment of the Michigan Court of Appeals denying Petitioner's application for leave to appeal should be vacated, and the Michigan Court of Appeals should be ordered to direct the trial court to appoint appellate counsel for Petitioner and to permit Petitioner, with the assistance of appellate counsel, to file a new application for leave to appeal after appellate counsel has had an opportunity to create the evidentiary record necessary for consideration of Petitioner's claims.

Respectfully submitted,

DAVID A. MORAN
Counsel of Record
WAYNE STATE UNIVERSITY
LAW SCHOOL
471 W. Palmer Street
Detroit, Michigan 48202
(313) 577-4829

MARK GRANZOTTO
414 West Fifth Street
Royal Oak, Michigan 48067
(248) 546-4649

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2611

MICHAEL J. STEINBERG
KARY L. MOSS
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
OF MICHIGAN
60 West Hancock Street
Detroit, Michigan 48201
(313) 578-6814

TERENCE R. FLANAGAN
P.O. Box 413
Hartland, Michigan 48353
(810) 632-9633

Counsel for Petitioner

Date: April 2005